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ABSTRACT

The author takes the position that communication is an essential, but often overlooked component of law and justice; furthermore, some of the current problems in the area of law and justice are basically communication problems. The author traces the early development of communication and law as closely related disciplines, with emphasis on the contributions of Aristotle, Cicero, and Quintilian. He discusses the decline of both rhetoric and law during the middle ages because of church influence and the feudal society and then summarizes the two legal forms that then emerged and influence law today: the British common-law system and the European civil code system. The author discusses current attempts to revive the relationship between rhetoric and law, with particular emphasis on the writings of the Belgian scholar Chaim Perelman. He outlines methods by which concepts of justice, once determined, can be made effective in terms of communication operating on four levels of legal activity: the lawyer-client relationship, the process of negotiation, the trial situation, and the judicial opinion. He concludes that law schools in America ignore the study of communication and makes recommendations for increased emphasis on legal communication as an essential part of the training of attorneys. (RN)

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COMMUNICATION, LAW, AND JUSTICE

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We can often clarify ideas considerably by discussing key terms and explaining the ways in which we intend to employ them. Communication will be regarded in a broad sense and include theory, practice, and research. Further we shall consider those concepts subsumed under rhetorical theory, part of the greater rubric of communication. I realize that some traditional rhetoricians will take issue with me on this point but I can adduce the fact that such scholars as Ted Clevenger, Sam Becker, and Wayne Brockriede would, and have agreed, and furthermore we now use the term communication as a name for academic departments and associations which bracket together rhetorical and communication concepts.

Second, I am going to deal with the term law in a slightly narrow sense in that I will deal only with those aspects of law which are employed in the settlement of disputes. This by no means encompasses the totality of the concept law but it does deal with that part of the notion of law which most often has an impact on the non-lawyer and which consumes a great proportion of the lawyers' time. This process of dispute settlement sometimes involves the institution of the courts, but often involves negotiation and counseling.

The term justice is indeed a complex concept and so again I shall for purposes of this paper narrow it somewhat so that I deal with justice only in the sense that the settlement of disputes in accord with the criteria of our society can be considered justice. In other words when our society accepts a decision as being reasonable and in alignment with our traditions and standards of conduct then we have achieved justice.

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The position that I am going to take is that communication is an essential, though often overlooked component of law and of justice. Furthermore I will maintain that at least some of the current problems in the areas of law and justice are at root communication problems.

If we examine the early development of both communication and law we can observe that up to a point they developed side-by-side. During the pre-Aristotilian period in the development of Greek rhetoric legal needs virtually dictated the nature and content of what we have come to call the sophistic rhetorics. Most of them were built around the proving of claims in the courts of the time. Because there were no professional lawyers or advocates every man of property had to be prepared to defend himself or his property in the courts. Since the Greeks did not develop complex legal codes or keep extensive court records, most of the legal theory of the time was found in the sophistic rhetorics.

As we know Aristotle broadened rhetoric in his handbook to include the deliberative and the panygeric speech as well as the by then traditional forensic or judicial speech. But we should observe that Aristotle devoted more attention to the forensic speech than to the other two types of speeches combined, even though he makes it clear that he considers the deliberative speech to be the most significant of the three. Aristotle offers early treatments of such still important notions as law and equity, the nature of wrongdoing and wrongdoers, the role of contracts and evidence, and the problem of tortured witnesses. Most recently two important writers have begun to re-examine Aristotle's notion of topoi or basic issues, in relation to legal argument.[1.]

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[1] Ch. Perelman and L. Olbrechts-Tyteca, The New Rhetoric, (Notre Dame, 1969). and Julius Stone, Legal System and Lawyers' Reasonings, (Stanford, 1964.)

The two major figures of Roman rhetoric, Cicero and Quintilian were both advocates or lawyers, and both were much concerned with rhetoric as law. Much of what Cicero had to say about Invention or the discovery of ideas, was based on analysis of the courtroom case and interviewing the client. A majority of Cicero's examples are drawn from the arena of legal rhetoric, even though Cicero was himself a member of the Roman Senate who played a major role in the politics of his times.

Quintilian also relied heavily on the courtroom model and added the additional device of the controversiae, or the hypothetical legal case as a classroom exercise. That particular device is still in widespread use in the law schools today. It seems reasonable to conclude that rhetoric formed the foundation of legal education in the Graeco-Roman era.

During the middle ages much of the classical rhetorical tradition was lost or ignored. The church dominated rhetorical theory and practice and the courts were replaced by the sword and the castle wall. Later this crude form of justice was refined by the addition of the trial by combat and trial by ordeal; neither approach required extensive knowledge or practice of rhetoric.

But as the King and Duke began to replace the robber Baron and feudal Lord, the new more civilized establishment began to settle disputes and dispense justice on the basis of the presentation of the opposing sides before the King at his court on certain specified court days. While the sovereign's judgment was at first based on his mercy and goodness, later such notions as justice and right came to be considered. When the King became unable to hear all the petitions for redress because of the pressure of other government business and because of the growing volume of petitions, the King began to appoint chancellors to hear the cases. The term "court of chancery" came from this practice and the British courts are still known as the Queen's courts, and the judges as the Queen's judges.

Unfortunately this rebirth of the legal system came at a time when rhetoric did not play a significant role in the educational system. The influence of Ramus was being felt and rhetoric was generally regarded as the study of ornamentation and delivery. Quite reasonably neither of these arts were seen as crucial to the newly emerging legal systems. Brevity forces me to oversimplify, but two legal systems developed in the West. The British model which came to America with the colonists was a common law system which used precedent or previous decisions of the courts as a significant basis for courtroom argument and for judicial decision making. This system was in part guided by statutes and written law, but it relied heavily on precedent.

On the continent of Europe the civil code system became the model. Possibly because the sovereigns were more powerful and more absolute and possibly because their heritage of Roman Law was stronger, the European judicial model was a detailed code of laws, as interpreted and administered by the courts. Precedent played a less significant role than in the common law countries. But once again rhetoric, divorced as it was from logic, was not seen as a factor in the legal system.

In Europe the attempt to revive the relationship between rhetoric and law appears to be the work of one scholar, Chaim Perelman. In America the views of the legal realists seem to be opening up legal theory to new considerations which I believe will ultimately lead to a renewed relationship between communication and law. But we are in such an early stage that speculation seems more in order than positive statements. In general the thrust of the legal realists has been that law is a complex social science and that many factors enter into the judicial process. Logic is seen as one factor, precedent as another, and so on. Jerome Frank suggests that the state of the judges

digestion and his love life may affect the outcome of a case just as much as stare decisis or an appellate brief. Oliver Wendell Holmes Jr. has, in his usual pithy fashion, defined the law "as what the court will decide tomorrow." Karl Llewellyn urged that a skeptical attitude be taken toward paper rules, but that a careful study be made of the rhetoric employed to navigate around the rules.

Austrailian juriprudence scholar Julious Stone has best summed up the potential for the interworking between rhetoric and law:

> Lawyers should certainly re-explore the "rhetorics" of the ancient world, and its elaboration in "the new rhetorics", as a conduit for more orderly transmission of ideas of justice and of facts of social life into the mobile and shifting body of legal propositions of which the common law consists. Though this is certainly not a simple task, even a first glance suggests that some features of the appellate judicial process which resist rationalization in terms of deduction from pre-existing legal propositions, fall more easily into place in terms of the notions with which rhetorics work.[2]

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[2]Julius Stone, op. cit. p. 333.

Noted Oxford Professor of jurisprudence, H. L. A. Hart writes that:

> The connection between law and the study of argument--rhetoric in the old non-pejorative sense of that word--is no less clear. Legal reasoning characteristically depends on precedent and analogy, and makes an appeal less to universal logical principles than to certain basic assumptions peculiar to the lawyer; it therefore offers the clearest and perhaps most instructive example of

> modes of persuasion which are rational and yet not in logical sense conclusive.

Hart's need to make it clear that he does not mean rhetoric as a synonym for ornamentation or bombast is in itself a revealing clue to his perceived notion about the view of rhetoric which may reside in the minds of the readers of his introduction to Perelman's work. Neither Hart nor Perelman should be counted among the legal realists, hence Hart's stress on precedent and analogy provide a view of the positivist approach to jurisprudence.

Another significant problem explicated by Perelman is the nature of juridical proof. He compared Aristotle's extra-technical or non-artistic proofs with scientific, historical, logical, and judicial proof, concluding that: "A thorough investigation of proof in law, of its variations and evolution, can more than any other study, acquaint us with the relations existing between thought and action.[3]

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[3]Chaim Perelman, op. cit. p. 108.

Throughout The Idea of Justice and the Problem of Argument Perelman was concerned by the long time neglect of argument by the formal logicians and philosophers. He urged that, "The logicians should complete their theory of demonstration by a theory of argumentation."[4] Once again he turned to the law to support his position and wrote:[5]

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[4]Chaim Perelman, op.cit. p. 145.

[5]Chaim Perelman, op.cit. p. 152.

> When it is a case of proving that a law has not been violated, the execution of the proof will very often depend on determining the precise meaning of the law. Juridical logic, which studies reasonings

> that are conclusive in law ranges outside formal problems when its object is to study the validity of an interpretation of the law. In such cases it does not, as might be thought, reduce itself to a kind of applied formal logic, for in law recourse is often had to methods of proof that are not demonstrative, but argumentative. It is often forgotten nowadays that argumentation is equally inspired by logic: and Aristotle, the father of formal logic, made a study alongside analytic proofs, of the proofs which he termed dialectic, and which he examines in the Topics, the Rhetoric, and the Refutations.

Having examined one group of conceptual notions on the relationships between communication and law I should like now to turn to a different theorist. Norbert Weiner in The Human Use of Human Beings had some provocative things to say:

> Law may be defined as the ethical control applied to communication, and to language as a form of communication, especially when this normative aspect is under the control of some authority sufficiently strong to give its decisions an effective social sanction. It is the process adjusting the "couplings" connecting the behavior of different individuals in such a way that what we call justice may be accomplished, and disputes may be avoided, or at least adjudicated. Thus the theory and practice of law involves two sets of problems: those of its conception of justice; and those of the technique by which those concepts of justice can be made effective.

It is my position that the first of Weiner's two problems "the concept of justice" is perhaps the task of the field of jurisprudence, even though rhetorical communication scholar Chaim Perelman has extensively addressed himself to that problem. The second problem enumerated "the technique by which those concepts of justice can be made effective" is clearly in the realm of communication. I see this technique operating as an exercise in communication on at least four levels of legal activity. First we have lawyer-client communication.

Thompson and Insalata found six basic problems in lawyer-client communication: 1) a disturbed emotional state in the client, 2) specific psychological problems such as self-deception, feelings of guilt, and desire for status, 3) pre-conceived notions by client and attorney, 4) divergent views as to the role of the attorney, 5) inadequate reinforcement and insufficient time, and 6) inaccurate and inadequate referential meanings.[6]

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6 _____, "A Study of Lawyer-Client Communication," Journal of Communication, March, 1963.

Second we have the process of negotiation, that is the attorney tries to resolve the matter by discussion or compromise. This process is widespread and diverse ranging from plea bargaining in criminal matters, to splitting differences in an insurance settlement, to contributing a sum of money to the forthcoming convention of a political party.

In so far as I am aware there have been only a few studies of the legal negotiation process. One by Smith in the Journal of Communication[7] concluded that communication was an important influence on negotiation. Clearly we need to study extensively the negotiation process and its role in the ajudication of legal disputes.

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7 _____, "The Role of Negotiation in Settlements" Journal of Communication, June, 1969.

The third level of legal communication is the familiar cliche of the trial. Most of us are full of Perry Mason misinformation in regard to the pleading of a case before a court of law, but clearly it is an exercise in communication. Chapter 13 in Jerome Frank's magnum opus Courts on Trial is entitled "a Trial as a Communicative Process".[8]

Here Frank considers such variables as feelings, tensions, verbal patterns, gestures, facial expressions, abstraction, subjectivity, and objectivity. Indeed the entire book is permeated with I would call a communication point of view.

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[8] _____, "Court on Trial" Princeton, New Jersey, 1949

Essentially what do trial lawyers do? They try to persuade the jury and or the judge to accept their version of the dispute at issue. I would view trial pleading as just that, an exercise in persuasion. Yet much credance is given to a legal fiction that the facts decide the case and that it makes little difference who argues the case. Even the authoritative volume of the Chicago jury project takes that position, I refer to Kalven and Zeisel's The American Jury.[9] The entire courtroom scene is an area which we should research extensively. We have made a

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[9] _____, "The American Jury" Boston, 1966.

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beginning: Robert Forston[10] has written on his study of judges instructions to jurors, Richard Rieke has done studies of different classes of arguments.[11] The communication research center at the University of Delaware is planning some studies of video taped trials in which several variables will be manipulated in an attempt to increase our understanding of the trial process and the functioning of the jury.

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[10] _____, "Judge's Instructions" Today's Speech, Fall 1970

[11] _____, "The Rhetoric of Law", Today's Speech, Fall 1970

The last of the four levels of legal communication is the level of the judicial opinion. In appellate courts the practice is for the court to hand down an opinion in writing. There is always at least one opinion which indicates how the court arrived at its decision. When judges agree on the verdict but have different reasons for that verdict more than one opinion may be offered, although this is the exception rather than the rule. Those judges who are in the minority may offer a written dissent along with their reasons for dissagreement and more than one dissent may be offered.

In theory the writing of opinions serves primarily as a guide to lawyers in their efforts to advise clients how the court will decide the future cases. On the other hand I will maintain another significant role of the opinion and the dissent is to gain public support for the position taken. In other words the practice of opinion writing is used by judges and courts to justify the position taken and to gain support for the position. This support is sought from many different publics; from the legal community, from the higher courts, from units of government, and from the public at large. We do not often look at judges as persuaders, or communicators, or rhetoricians, but I would maintain that it would be profitable to do so.

Appellate court judges know the law reasonable well, even if they have a less than expert knowledge of the law, they do have clerks who are the honor graduates of the best law schools. And even if the clerks have somehow missed a case or point of law, it is extremely unlikely that the plaintiffs and defendants counsel have missed anything in their lengthy and exhaustive briefs.

What then is the difference between an excellent judge and a mediocre judge? Assuming both are fair and objective, I would maintain that the ability to persuade, justify, and communicate is the essential difference between them.

I hope I have established my case that communication is an essential aspect of law and of justice. I should point out that for the most part the American Law School simply ignores the study of communication. Students read judicial opinions and pick them apart for clues to the law therein stated, but they seldom if ever consider the persuasiveness of an opinion. Law schools most often offer moot court for one credit; and sometimes for no credit. But moot courts concentrate on appellate procedures and the technicalities of the law. Students in legal writing courses are told to write persuasive briefs but are never instructed in how to communicate persuasively. Nowhere is a reasonable level of ability as a communicator or a persuader a requirement for admission to law school.

As might be expected the result is a shortage of trial lawyers, attorneys who are willing and able to communicate in the courts. At least part of the current log jam in the courts is due to the shortage of competant trial lawyers, and this shortage exists in a time of record enrollments in the law schools and record numbers of new attorney's being admitted to the bar. We need then to do three things:

1. Continue to develop concepts, systems, and models of legal communication.
2. Increase our research of the legal communication process and of all the associated variables.
3. Try to develop courses and programs at both the undergraduate and the law school level that will serve to raise the communication level of the legal profession.